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80-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. _____

STATE OF FLORIDA,

PETITIONER,

-VS-

VINCENT ANTHONY BUSCH,

RESPONDENT.

Petition for Writ of Certiorari
to the District Court of Appeal,
First District, State of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, ERRED IN HOLDING THIS COURT'S DECISION IN *PAYTON V. NEW YORK*, 445 U.S. ___, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980) WAS APPLICABLE TO THE INSTANT CASE MERELY BECAUSE THIS COURT VACATED THE DISTRICT COURT'S PRIOR DECISION AND REMANDED THE CAUSE FOR FURTHER CONSIDERATION IN LIGHT OF *PAYTON V. NEW YORK*, SUPRA.

THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, ERRED IN HOLDING *PAYTON V. NEW YORK* WAS RETROACTIVE AND APPLICABLE TO THIS CASE WHEN THE ARREST AND SEIZURE WAS EFFECTED PRIOR TO THE FILING OF THE OPINION IN *PAYTON*.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of Florida petitions for a writ of certiorari to review the judgment of the District Court of Appeal, First District, State of Florida.

OPINIONS BELOW

The decision of the District Court of Appeal, First District, was rendered on November 17, 1980, and is reported in 392 So.2d 272 (Fla.1st DCA 1980).

The previous decision of the District Court of Appeal, First District, was rendered on February 27, 1978, and is reported in 355 So.2d 488 (Fla.1st DCA 1978).

The previous order of this Court vacating the original decision of the District Court of Appeal, First District, remanding said cause of further proceedings is reported in ___ U.S. ___, 64 L.Ed.2d 255 (1980).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the District Court of Appeal, First District, State of Florida, was rendered on November 17, 1980. Petitioner's timely Motion for Rehearing was denied by order of that court on February 4, 1981. This petition is timely filed within sixty (60) days of that date. Jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

STATUTORY PROVISIONS INVOLVED

Section 901.15, Florida Statutes, provides in pertinent part:

> 901.15 When arrest by officer without warrant is lawful.—A peace officer may arrest a person without a warrant when:
> (1) The person has committed a felony or misdemeanor or violated a municipal ordinance in the presence of the officer. Arrest for the commission of a misdemeanor or violation of a municipal ordinance shall be made immediately or in fresh pursuit.

(2) A felony has been committed and he reasonably believes that the person committed it.

(3) He reasonably believes that a felony has been or is being committed and reasonably believes that the person to be arrested has committed or is committing it.

STATEMENT OF THE CASE

On January 11, 1977, at approximately 9:30 a.m. respondent was arrested at his home without a warrant. An information was thereafter filed against respondent charging him with robbery and in due course a motion to suppress was filed claiming the confession was unlawfully obtained because respondent was arrested without probable cause and was effected without a warrant. The prosecutor contended under Florida law no warrant was required. The trial judge denied the motion to suppress finding probable cause existed and that the arrest was therefore lawful. He also found the state-

ment given by respondent was freely and voluntarily given after appropriate warnings had been given to respondent.

Respondent was found guilty and sentenced. He instituted an appeal to the District Court of Appeal, First District, and argued that the warrantless arrest was invalid under the Fourth Amendment to the United States Constitution and that under *Brown v. Illinois*, 422 U.S. 590 (1975) the statement was inadmissible because it was tainted by the prior illegal arrest. No claim was made that there was no probable cause or that the statement was not freely, voluntarily or intelligently given after respondent had been appropriately advised of his right to remain silent. The State responded by arguing that under *State v. Perez*, 277 So.2d 778 (Fla.1973), *cert.denied*, 414 U.S. 1064 (1973) and Section 901.15, Florida Statutes, an arrest without a warrant upon probable cause was valid.

The appellate court rendered its decision affirming the judgment and sentence and held the ". . . trial court was correct in denying appellant's motion to suppress. . ." citing to *State v. Perez*, supra. 355 So.2d at 488. Appendix at 1.

Respondent filed a petition for writ of certiorari in this Court and on April 21, 1980, after this Court filed its opinion in *Payton*, it vacated the judgment and sentence and remanded the cause to the district court with instructions to reconsider the matter in light of *Payton*, supra. *Busch v. Florida*, ___ U.S. ___, 64 L.Ed.2d 255 (1980).

The district court ordered supplemental briefs from respondent and petitioner. Respondent asserted that *Payton* was controlling and that the judgment should be vacated with directions that he be discharged. Petitioner, State of Florida,

argued that (1) *Payton v. New York* was not retroactive and thus not applicable to the instant case and (2) even if it were the case it should be remanded for a determination of whether the prior illegality rendered the statement inadmissible.

The district court rendered the decision sought to be reviewed herein finding *Payton* applicable but remanded the cause to the trial court to determine whether the authorities were admitted with the consent of a person authorized to give such consent and, if not, whether the confession was, in fact, the fruit of the illegal arrest under *Brown v. Illinois*, supra, and *Dunaway v. New York*, 442 U.S. 200 (1979). Appendix p. 9. After observing that there was ". . . no dispute that the officers had probable cause to arrest Busch, and they effected the arrest in a manner that had not been declared illegal at that time. . ." the district court

rejected petitioner's argument that *Payton* was not retroactive, saying:

> We have considered the state's contention that Payton should not be given retrospective application and find it to be without merit. The United States Supreme Court would not have vacated the judgment in this case and remanded it to this Court for further consideration in light of Payton if there had been no intention on the part of the Supreme Court that Payton be applied to this case, which was not final and was pending in the Supreme Court at the time its opinion in Payton was rendered. Compare Linkletter v. Walker, 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731 (1965), whch states at page 627:
>
> > Under our cases it appears (1) that a change in law will be given effect while a case is on direct review, (citation omitted) . . .
>
> Remanded for further proceedings consistent with this opinion. Appendix p. 14.

Petitioner filed a motion for rehearing urging the district court that it erred in relying upon *Linkletter v. Walker*, 381 U.S. 618 (1965); overlooked several decisions rendered by this Court subsequent to

Linkletter, supra; and decided the cause in conflict with this Court's controlling opinion in *Bowen v. United States*, 422 U.S. 916 (1975), *affirming*, *United States v. Bowen*, 500 F.2d 960 (9th Cir.1974). Petitioner specifically argued that simply because this Court vacated the district court's prior judgment and remanded the cause for reconsideration in light of *Payton* did not mean this Court intended that *Payton* was retroactively applicable to the instant case. (Appendix, p. 15-24).

The district court denied petitioner's Motion for Rehearing and granted a stay of the mandate pending the timely filing of a petition for writ of certiorari in this Court, and if so filed, until disposed of.

The instant petition for writ of certiorari was thus filed.[1]

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[1] The State of Florida did not seek discretionary review in the Supreme Court of

REASONS FOR GRANTING THE PETITION

The State of Florida respectfully submits this Court should grant the instant petition for writ of certiorari because the lower tribunal *rather* than deciding that *Payton v. New York*, supra, *should* be retroactively applicable to this case based upon the criteria to be used to determine such issue concluded it *was* applicable to this case, and presumably to all "pipeline" cases, because this Court ". . . would not have vacated the judgment in this case and remanded it to this Court for further con-

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Florida because it had previously sought such review in that court in the case of State v. Santamaria, ___ So.2d ___ (Fla. 1980) to review Santamaria v. State, 385 So.2d 1130 (Fla.1st DCA 1980) and review was denied. Moreover, under Nash v. Florida Industrial Commission, 389 U.S. 235 (1967) attempting to obtain review before that court is unnecessary since review, as a matter of right, is unavailable under Florida law. Fla.R.App.P. 9.030(a)(1) and (2).

sideration in light of Payton if there had been no intention on the part of the Supreme Court that Payton be applied to this case. . . ." Appendix p. 14.

The decision sought to be reviewed is directly in conflict with the precise holding of this Court in *Williams v. United States*, 401 U.S. 646 (1971); *Michigan v. Payne*, 412 U.S. 47 (1973); and *Bowen v. United States*, supra; in conflict with decisions rendered by several United States Circuit Courts of Appeals, *United States v. Bowen*, supra; *United States v. Miller*, 492 F.2d 37 (5th Cir.1974) and *Chapman v. United States*, 547 F.2d 1240 (5th Cir.1977); and in conflict with the decision of the Supreme Court of New Jersey in *State v. Carpentieri*, 414 A.2d 966 (N.J. 1980).

The foregoing cases all hold that when this Court remands a case for further consideration in light of a newly announced

rule pertaining to the legality of arrests or seizures under the Fourth Amendment it does *not* mean the newly announced decision is retroactive or applicable to the case under consideration.

In *United States v. Miller*, supra, this Court on certiorari vacated a decision of the Circuit Court of Appeals, Fifth Circuit, and remanded it for further consideration in light of *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). On the remand Miller contended *Almeida-Sanchez* had to be applied because his conviction was not "final" and that since the prior affirmance of his conviction was vacated by this Court and remanded for further consideration in the light of *Almeida-Sanchez*, ". . . it is manifest that the Court *intended* its decision to be given retrospective application" 492 F.2d at 39. The Fifth Circuit disagreed holding:

> [t]he fact that our judgment was vacated and the case remanded for further consideration in the light of *Almeida-Sanchez*, particularly when the retroactivity issue had not been considered by this Court, does not imply that *Almeida-Sanchez* is necessarily retrospectively applicable to cases tried before it was decided. We take it that, had this been the Court's desire, certiorari could have been *granted* and this case summarily *reversed on the authority of Almeida-Sanchez*, rather than being remanded for further consideration. We thus move on to the question of whether *Almeida-Sanchez should* be given retrospective application. 492 F.2d at 40

In *Chapman v. United States*, supra, the Court citing to *Miller* and *Bowen v. United States*, supra, 547 F.2d at 1247, n. 11, again stated that ". . . it would be improper to conclude merely from the Supreme Court's remanding in light of *Doyle* that it intended *Doyle* to be fully retroactive" 547 F.2d at 1247.

The Supreme Court of New Jersey in *State v. Carpentieri*, supra, in a lengthy decision pertaining to the retroactivity of *Delaware*

v. Prouse, 440 U.S. 648 (1979) correctly held ". . . summary orders by the Supreme Court directing remand for reconsideration in light of new exclusionary rule decisions do *not* intimate the Court's view on the retroactivity of such new decisions. . ." 414 A.2d at 971, citing to this Court's decision in *Bowen*, supra.

It is apparent from the face of the decision sought to be reviewed that the district court concluded this Court *intended Payton* to be applied to the instant case simply because it vacated and remanded the cause for further consideration. Since the retroactivity of *Payton* is a federal question and this Court has already rejected the "pipeline" theory, the District Court of Appeal, First District, was not free to disregard the aforementioned decisions of this Court and *assume Payton* was applicable to arrests and seizures that occurred prior

to the date that decision was filed. *Oregon v. Hass*, 420 U.S. 714 (1975). A substantial federal question is presented by this petition as to the meaning and import of an order of this Court vacating a lower court decision and remanding for further consideration in light of a written opinion by this Court and said federal question was decided by the lower tribunal in a way in conflict with the decisions of federal courts of appeal, highest state courts from other jurisdictions and this Court[2]. See: Rule 17(1)(a)(b) and (c), Rules of the Supreme Court.

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[2] The judgment sought to be reviewed is a final judgment under 28 U.S.C. §1257(3) notwithstanding the fact that the case was remanded for further proceedings on the merits, since the federal claim presented herein has been finally determined and later review cannot be had because it is the law of the case and if the respondent were to be acquitted on a retrial, the State would have no appeal. See: California v. Green, 384 U.S. 436 (1966).

Of course, *Payton* announced a new rule respecting the warrantless arrest of persons within their own homes and prior to said ruling the law enforcement authorities had every right to rely upon the prior holdings of the Florida Supreme Court in *State v. Perez*, supra. Indeed, the lower tribunal originally upheld the judgment and sentence on the basis of that holding. 355 So.2d at 488. Other courts had upheld warrantless arrests which were accomplished by peaceful means during the daytime. *United States v. Williams*, 575 F.2d 348 (5th Cir.1978); *United States v. Fernandez*, 480 F.2d 726 (2d Cir.1973); *United States v. Hall*, 348 F.2d 837 (2d Cir.1965); *People v. Payton*, 380 N.E.2d 224 (N.Y.App. 1978) and *People v. Johnson*, 259 N.E.2d 57 (Ill. 1970).

Given the purpose of the exclusionary rule, to-wit: to deter *future* police mis-

conduct, no useful purpose would or could be served by declaring *Payton* retroactively applicable to cases involving arrests that occurred prior to the date it was filed. *United States v. Peltier*, 422 U.S. 531 (1975); *Michigan v. Payne*, 412 U.S. 47 (1973) and *Desist v. United States*, 394 U.S. 244 (1969). Needless to say, applying *Payton* retroactively could and would have a serious impact upon the administration of justice and would place in jeopardy every conviction obtained in good-faith reliance on *State v. Perez*, supra.

The District Court of Appeal, First District, erred in applying *Payton* to arrests effected prior to the date that case was decided and resolved a substantial federal question in conflict with the way this Court would have resolved it under its prior decisions concerning retroactivity.

CONCLUSION

Petitioner submits that the judgment sought to be reviewed should be summarily vacated and remanded to the District Court of Appeal, First District, with directions to *decide* whether *Payton v. New York* is retroactive or applicable to this case under the standards announced in *United States v. Peltier*, supra, 422 U.S. at 538-539 and the cases cited therein, without regard to the fact that this Court previously vacated the district court's original judgment. Alternatively, the Court should grant the petition for writ of certiorari filed herein for the purpose of deciding whether *Payton v. New York* is retroactive.

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A P P E N D I X

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JANUARY TERM, A. D. 1978

VINCENT ANTHONY BUSCH,

APPELLANT,

-VS- CASE NO. GG-445

STATE OF FLORIDA,

APPELLEE.

Opinion filed February 27, 1978.

McCORD, Chief Judge.

Appellant contends first that the trial judge should have suppressed his confession because it was the result of an arrest of appellant in his home without a warrant and with no showing by the state of exigent circumstances that would have excused the absence of an arrest warrant. The trial court was correct in denying appellant's motion to suppress. See State v. Perez, 277 So.2d 778 (Fla.1973). Appellant next

contends that the trial court erred by instructing the jury that he could be found guilty of robbery committed while carrying a firearm when the evidence conclusively established that the firearm was in the possession of appellant's accomplice and that the judgment and sentence for armed robbery are, therefore, not supported by the evidence. Appellant cites Earnest v. State, ___ So.2d ___, Fla. Supreme Court Case No. 51,491, opinion filed August 31, 1977, rehearing denied December 6, 1977. There, the Supreme Court construed §775.087(2), Florida Statutes (1975), which provides that any person who is convicted of robbery and who had in his possession a firearm shall be sentenced to a minimum term of imprisonment of three years. The court held that the three-year minimum term under the statute applied only to physical possession of a firearm by a

defendant rather than constructive possession. Here, as in Earnest, the appellant, who did not have a firearm, was convicted as an aider and abettor of the crime in which he participated--robbery in which the offender carried a firearm or other deadly weapon [§812.13(1) and (2)(a), Florida Statutes (1975)], rather than robbery in which the offender carried no firearm, deadly weapon, or other weapon [§812.13(1) and (2)(c), Florida Statutes (1975)]. Here, unlike in Earnest, appellant was not sentenced to minimum three-year term of imprisonment; thus, we are not concerned with §775.087(2).

The Supreme Court in Earnest did not in any way abrogate §777.011, Florida Statutes (1975), dealing with principals in the first degree. That statute provides that whoever aids, abets, counsels, hires or otherwise procures an offense to be com-

mitted and such offense is committed is a principal in the first degree and may be charged, convicted and punished as such whether he is or is not actually or constructively present at the commission of such offense. That statute makes an aider and abettor a principal in the first degree to the crime he aids and abets. Here, the evidence clearly shows that appellant was present aiding and abetting his accomplice in the accomplice's commission of the crime of robbery with a firearm. Thus, appellant is guilty as a principal in the first degree of that crime rather than the crime of robbery in which the offender carried no firearm, deadly weapon, or other weapon.

AFFIRMED.

BOYER, J., and McLANE, RALPH M., Associate Judge, CONCUR.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

April 21, 1980

Raymond L. Marky, Esq.
Assistant Attorney General
Room 1500, The Capitol
Tallahassee, FL 32304

Re: Vincent Anthony Bush
v. Florida
No. 78-5403

Dear Mr. Marky:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the District Court of Appeal of Florida, First District, for further consideration in light of Payton v. New York, 445 U.S. ___(1980).

Very truly yours,

MICHAEL RODAK, JR.,
Clerk

by

Francis J. Lorson
Deputy Clerk

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

VINCENT ANTHONY BUSCH,

APPELLANT,

-VS- CASE NO. GG-445

STATE OF FLORIDA,

APPELLEE.

Opinion filed November 17, 1980.

McCORD, J.

The United States Supreme Court has vacated our judgment in this case [355 So.2d 488 (Fla.1st DCA 1978)] and remanded the cause for further consideration. On remand, we are to consider whether the holding in Payton v. New York, 445 U.S. ___, 63 L.Ed. 2d 639, 100 S.Ct. 1371 (1980), requires that the confession of Busch following his warrantless arrest in his home be suppressed. In our previous opinion in this case, on the authority of Perez v. State, 277 So.2d 778 (Fla.1973), we found that the trial

court was correct in denying Busch's motion to suppress his confession. Since that opinion was handed down, the U. S. Supreme Court has ruled, in Payton, that the Fourth Amendment prohibits police officers from making a warrantless, nonconsensual entry into a suspect's home in order to make a routine arrest in the absence of exigent circumstances. The initial question here is whether the officers' entry into Busch's home was, in fact, nonconsensual. The evidence shows that Busch was implicated by another suspect in a robbery case. Without obtaining an arrest warrant, two detectives went to Busch's home, were admitted by another occupant, found Busch asleep, and with their guns drawn awoke and arrested him. He was taken to jail, given the Miranda warnings, and within approximately three hours, he had given the officers a confession. The trial court found that

the confession was freely and voluntarily given and, therefore, denied Busch's motion to suppress it. Busch was subsequently convicted of armed robbery.

The key factor is that the officers were admitted to the home by another person. The record contains conflict and is unclear as to whether the admittance was consensual. Therefore, we remand to the trial court for further hearing on the question of whether or not the admittance of the officers was consensual. If the admittance was consensual, appellant's conviction will stand because the holding in Payton would not apply, the arrest would be deemed legal and the subsequent confession would be admissible, the court having already found that it was freely and voluntarily given.

However, if the trial court finds on remand that the admittance of the officers was nonconsensual, then, under Payton, the

arrest was illegal and a more complicated question arises. If the arrest was illegal, then any statements made by Busch which were the fruits of the illegal arrest should be excluded from evidence. Wong Sun v. United States, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963). Thus, the question to be considered will be whether the confession Busch seeks to have suppressed is, in fact, the fruit of the illegal arrest. The court in Wong Sun declared that verbal evidence which derives immediately from an unlawful entry and an unauthorized arrest is the fruit of the illegal action on the part of police officers and must be suppressed. However, the Wong Sun court also recognized that when the connection between the illegal arrest and the statement given had "become so attenuated as to dissipate the taint," the statement is not considered to be the fruit of the illegal arrest, and,

therefore, the statement is admissible. Nardone v. United States, 308 U.S. 338, 84 L.Ed. 307, 60 S.Ct. 266 (1939). The court found that Won Sun's confession was not the fruit of his illegal arrest since, after the arrest, he was released on his own recognizance and returned voluntarily several days later to make the statement.

Therefore, if Payton applies, in keeping with Won Sun v. United States, we must look to the circumstances surrounding Busch's confession to determine whether the confession was "sufficiently an act of free will to purge the primary taint of the unlawful invasion." Id. at 371 U.S. 486. To do so, we must inquire as to what factors will purge the primary taint.

In Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416, 95 S.Ct. 2254 (1975), the court drew a distinction between satisfaction of Fourth and Fifth Amendment require-

ments. The court found that while the giving of the Miranda warnings might satisfy Fifth Amendment requirements, the giving of those warnings does not in and of itself break the causal chain between an illegal arrest and a confession. The Brown decision declared that the question of whether a confession is voluntary for Fourth Amendment purposes under Wong Sun should be answered on the facts of each case. The court stated:

> No single fact is dispositive . . . The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, (citation omitted) and, particularly, the purpose and flagrancy of the official misconduct are all relevant. . . And the burden of showing admissibility rests, of course, on the prosecution.

In Brown, the court found that in the less than two hours that elapsed between the

arrest and the confession, there was no intervening event of significance which would purge the taint of the illegal arrest. The court found further that the arrest had a quality of purposefulness in that it was an "expedition for evidence" admittedly undertaken "in the hope that something might turn up." Because of those factual circumstances in the Brown case, the court declined to remand the case for further factual findings, concluding that the state had failed to sustain the burden of showing that the evidence in question was admissible under Wong Sun. Compare also Dunaway v. New York, 442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979), which involved a situation similar to the Brown case and which reached the same result. In both Brown and Dunaway, the arrests were illegal because they were made without probable cause.

The instant case is governed by the principles set forth in Wong Sun, Brown, and Dunaway. However, unlike the Brown and Dunaway cases, we do not find that the officers here engaged in purposeful misconduct in order to effectuate the arrest of Busch. There is no dispute that the officers had probable cause to arrest Busch, and they effected the arrest in a manner that had not been declared illegal at that time. The circumstances surrounding Busch's confession are not so clearly set forth in the record that we can make a determination as to whether or not the confession was given so freely and voluntarily as to purge the primary taint of the unlawful arrest. Therefore, contingent upon the trial court's finding on the entry question, further proceedings should be had below to determine whether or not the facts surrounding the confession satisfy the Wong Sun requirements.

We have considered the state's contention that Payton should not be given retrospective application and find it to be without merit. The United States Supreme Court would not have vacated the judgment in this case and remanded it to this Court for further consideration in light of Payton if there had been no intention on the part of the Supreme Court that Payton be applied to this case, which was not final and was pending in the Supreme Court at the time its opinion in Payton was rendered. Compare Linkletter v. Walker, 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731 (1965), which states at page 627:

> Under our cases it appears (1) that a change in law will be given effect while a case is on direct review, (citation omitted) . . .

Remanded for further proceedings consistent with this opinion.

SMITH, L., and SHIVERS, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

VINCENT ANTHONY BUSCH,

APPELLANT,

-VS- CASE NO. GG-445

STATE OF FLORIDA,

APPELLEE.

MOTION FOR REHEARING

Comes now Appellee, State of Florida, by and through its undersigned attorney and files this its motion for rehearing and says as follows:

I

This Court in its opinion rendered in this cause after further consideration in light of *Payton v. New York*, 455 U.S. ___, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980), said:

> We have considered the state's contention that Payton should not be given retrospective application and find it to be without merit. The United States Supreme Court would not have vacated the judgment in

> this case and remanded it to this Court for further consideration in light of Payton if there had been no intention on the part of the Supreme Court that Payton be applied to this case, which was not final and was pending in the Supreme Court at the time its opinion in Payton was rendered. Compare Linkletter v. Walker, 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731 (1965), which states at page 627:
>
> > Under our cases it appears (1) that a change in law will be given effect while a case is on direct review, (citation omitted) . . . (Slip op. at 4-5)

This holding rests upon *dictum* contained in *Linkletter v. Walker*, 381 U.S. 618 (1965) and was prompted by a statement in Appellant's reply brief to the effect that:

> Whatever may be the fine points of the doctrine of retroactivity as it applies to other cases, it would be a flagrant disregard of the mandate of the United States Supreme Court to hold that *Payton* does not apply here. If the state's position were correct, the United States Supreme Court would have denied the appellant's petition for writ of certiorari. (Supplemental Reply Brief of Appellant at p. 2)

No *authority* was cited to support this assumption of what the Supreme Court intended when it sent this case back for reconsideration.

II

Appellant and this Court by overlooking or failing to consider the clear import of *Williams v. United States*, 401 U.S. 646 (1971) and *Michigan v. Payne*, 412 U.S. 47 (1973) have reached a conclusion directly contrary to the holding of the United States Supreme Court in *Bowen v. United States*, 422 U.S. 916 (1975), which was decided after *Linkletter v. Walker*, supra.

III

In *Bowen*, the defendant was stopped by border patrol authorities who discovered contraband in Bowen's vehicle. This led to defendant's conviction on certain drug-related offenses in federal court. Following the affirmance of his convictions

by the Ninth Circuit Court of Appeals, defendant petitioned for certiorari to the United States Supreme Court. That petition was still pending when the Court announced its decision in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), which invalidated the use of roving patrols to search motor vehicles with neither a warrant nor probable cause, at points removed from the border and its equivalents. Shortly, thereafter, the court granted Bowen's petition, vacated the judgment below and remanded the matter to the Court of Appeals for further consideration in light of *Almeida-Sanchez v. United States*--precisely what occurred in this case.

The Court of Appeals considered whether the new rule of law promulgated in that case was properly to be applied to events occurring before its announcement and concluding that the mandate of *Almeida-Sanchez* would

not be applied to invalidate border patrol searches conducted prior to the date of that decision, *reaffirmed* Bowen's convictions. See: *United States v. Bowen*, 500 F.2d 960 (9th Cir.1974). Said Court relied upon *Williams v. United States*, and *Michigan v. Payne*, supra, as authority for not applying *Almeida-Sanchez* to the "pipeline" cases--that is cases on appeal, and said:

> The only remaining question is the date upon which *Almeida-Sanchez* would become applicable to searches at fixed checkpoints. Some would argue that there should be at least a limited retroactivity, requiring us to apply the new rule to those cases involving searches at fixed checkpoints that are now on direct appeal. These are the so-called "pipeline" cases. We reject this approach and hold that *Almeida-Sanchez* applies only to searches at fixed checkpoints after June 21, 1973, the date of the *Almeida-Sanchez* decision. The Supreme Court's recent decisions indicate that the pipeline theory does not enjoy majority approval. *See* Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The Court had *precisely that issue before it in Williams v. United States*,

401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971), and a majority declined to apply the new rule either to the cases in the *pipeline* (on direct appeal) or to the cases that were before the Court on collateral attack. Only Justices Brennan and Marshall supported the *pipeline* theory.

In Michigan v. Payne, 412 U.S. 47, 93 S.Ct. 1966, 36 L.Ed.2d 736 (1973), the Court again adopted limited prospectively, *i.e.*, only the challenging appellant would benefit from the new rule. In *Payne*, the Court held that the prophylactic limitations established in North Carolina v. Pearce, 395 U.S. 711, 723-726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), would not be applicable to resentencing proceedings that occurred prior to the date of the *Pearce* decision, even though Payne's appeal was in the pipeline when *Pearce* was decided. Justice Marshall, dissenting, concluded that "considerations of fairness rooted in the Constitution [require] that cases in the pipeline when a new constitutional rule is announced must be given the benefit of that rule." 412 U.S. at 60. None of the other justices joined in this part of his dissent and Justice Marshall himself admitted that, other than exceptions not applicable in this case, all "constitutional rules of criminal procedure have been given prospective effect only." 412 U.S. at 62 (footnote omitted). He noted that limited retroactivity, as applied in *Linkletter* [381 U.S. at 622], was an

> "anomaly." *It would be unwise for us to adopt the pipeline theory when the Court has declined to apply it.* 500 F.2d at 979-980

Bowen applied for certiorari and after granting the writ the United States Supreme Court citing to *Michigan v. Payne* and *United States v. Peltier*, 422 U.S. 531 (1975) another case relied on by the State in its brief, held the Fourth Amendment exclusionary rule would not be served by applying the principles of *Almeida-Sanchez*, supra, retroactively and AFFIRMED the decision of the Court of Appeals!

The fact that the Supreme Court vacated this Court's prior decision for reconsideration in light of *Payton* did not mean that the court intended "that Payton be applied to this case" anymore than it did in *Bowen*. See: 500 F.2d at 980 n. 4. Moreover, the retroactivity of *Payton* was not raised by the State of Florida in the prior proceeding before the United States

Supreme Court. It *could not* because this Court did not decide the question in the original decision and the Supreme Court of the United States cannot review an issue which was not raised and disposed of in the lower tribunal. *Cardinale v. Louisiana*, 384 U.S. 437 (1969).

For a like holding as it related to the application of *Delaware v. Prouse*, 440 U.S. 648 (1979) upon cases pending on appeal when that case was decided see *State v. Carpentieri*, 414 A.2d 966 (N.J. 1980).

IV

The opinion sought to be reheard has reached a result contrary to a *controlling* United States Supreme Court decision as to the meaning of a remand by that Court for reconsideration by a lower court in light

of a newly announced opinion. Since this involves a question of federal law, this Court is bound by said decision. *Oregon v. Hass*, 420 U.S. 714, 720 (1975).

WHEREFORE, Appellee respectfully moves this Court to grant this motion for rehearing and affirm the judgment and sentence. Should the Court decline to grant rehearing in this cause, then Appellee suggests that this Court certify the question to the Florida Supreme Court as a question to be of great public importance pursuant to Article V, Florida Constitution, and Fla. R.App.P. 9.030(a)(2)(A)(v).

Respectfully submitted,

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COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Rehearing has been forwarded to Mr. Michael J. Minerva, Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 24th day of November, 1980.

Raymond L. Marky
Assistant Attorney General

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Supreme Court Building
Tallahassee, Florida 32304
Telephone No. (904) 488-6152

February 3, 1981

CASE NO. GG-445

VINCENT ANTHONY BUSCH VS. STATE OF FLORIDA

Appellant/Petitioner, Appellee/Respondent.

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

The following action was taken in the above styled case on the above date.

Appellee's Motion for Rehearing was denied.

By Order of the Court

RAYMOND E. RHODES, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Michael J. Minerva, Public Defender, Tallahassee, Florida; Robert L. Shevin, Attorney General, Raymond L. Marky, Assistant Attorney General, Tallahassee, Florida..

s/ Karen Roberts
Deputy Clerk